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MOTION FILED NOV 12 1958

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

—against—

The steamtug LONG BRANCH, the RAILWAY CAR-FLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents

(and three related causes)

MOTION AND BRIEF OF CANADIAN SHIPOWNERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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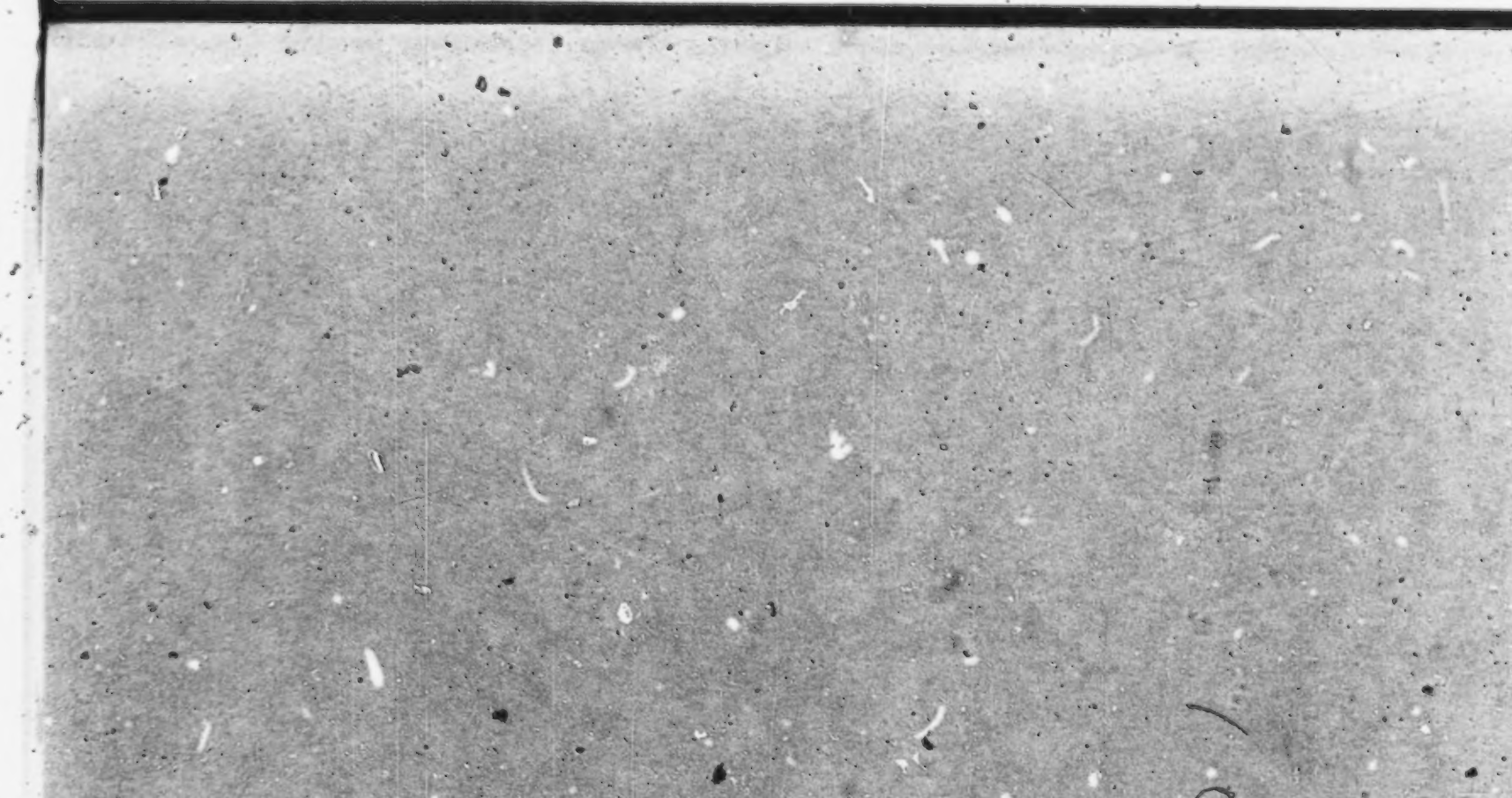
Of Counsel



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MOTION OF CANADIAN SHIPOWNERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Canadian Shipowners Association is an association of Canadian shipowners and operators which was formed in Canada and has its head office in Ottawa. One of the objects of the Association is to promote agreement and cooperation among shipowners, to present their opinions and desires to the proper authorities, to represent them at national and international maritime meetings, to seek appropriate legislative

enactments and judicial pronouncements, to seek redress of grievances and removal of unjust and avoidable burdens and restrictions, and the attainment of all beneficial objects which may affect generally the interests of the membership wherever such aims may be promoted more effectually and more beneficially by the Association than by individuals.

The present membership of the Association comprises 23 Canadian shipowning companies, a great proportion of them also operating ships under charter, which ships fly the flags of many other maritime countries. The 53 oceangoing vessels owned by the membership represent 67% of the Canadian-owned ocean merchant marine. The gross registered tonnage of the ships so entered is 420,086 tons and the ships themselves are dry cargo carriers, tankers, and specialized ore carriers. The vessels operated by the membership under charter are of a gross tonnage greatly in excess of the tonnage of the vessels owned by members of the Association.

Much of the trade carried on by members of the Association is with the United States and the most important trades consist in, for instance, iron ore moving from Labrador to United States ports on the East Coast, newsprint from Newfoundland to United States Atlantic East Coast ports, barytes from Nova Scotia ports to United States Gulf ports, sulphur from United States Gulf ports to St. Lawrence River ports, general cargo to and from Canadian and United States ports on the Great Lakes. There is also an inter-continental general cargo service between the East and West Coasts of Canada, with calls at intermediate United States ports on both coasts.

The Canadian Shipowners Association hereby respectfully moves for leave to file a brief *amicus curiae* in support of the petitions of Deep Sea Tankers, Limited, et al., for a Writ of Certiorari in the above cases, limited solely to the question of determining the basis on which the liability of the owners of tugs and tows shall be calculated where such owners seek limitation before the Courts of the United States.

Although neither Deep Sea Tankers, Limited, nor Shell Oil Company is a member of the Association, the Association nevertheless makes this motion because of the importance of this matter to the industry as a whole.

Petitioners have consented to the Association's filing a brief *amicus curiae* but neither respondent has so consented.

The interest of the Canadian Shipowners Association in these cases is pursuant to its Articles of Association:

1. To arrive at a uniform basis for purposes of calculating the size of the limitation fund available to satisfy the claims of the various claimants—i.e. in this case, whether the fund should include the value of each vessel in a flotilla or be limited solely to the value of the tug-boat.

2. In particular, to protect its members from the adverse consequences that would flow from a different basis being used, depending upon whether limitation is sought in a Canadian or American jurisdiction, thus minimizing the capricious results that would flow from forum shopping.

Petitioners being only a single shipowner and a single charterer respectively, may not be in a position to present adequately to this Court the importance of these questions to the entire shipping industry and to the members of this Association.

WHEREFORE, Canadian Shipowners Association moves this Honorable Court for leave to file the attached brief as *amicus curiae*.

Dated: New York, N. Y.,
November 10, 1958

Respectfully submitted,

WALTER A. DARBY, JR.
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JEAN BRISSET, Q.C.
Of Counsel

IN THE

Supreme Court of the United States

October Term 1958

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

—against—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents

(and three related causes)

No. . . . .

BRIEF OF CANADIAN SHIPOWNERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The facts and questions presented have been stated by the petitioners and need not be repeated.

We urge that the decision of the Court of Appeals be reviewed insofar as it pertains to limitation of liability because it is based upon a 1919 decision of this Court, *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, which the Court of Appeals reluctantly followed, and because it substantially restricts the size or amount of the limitation fund available for distribution to victims of disasters a result which would be contrary to the law of England and Canada.

If the case had been litigated in Canada, the tugs and their tows would have been considered as single units and the limitation of liability calculated on the tonnage of the mass or flotilla.

The Exchequer Court of Canada in the case of the owners of the M. S. PACIFIC EXPRESS and the tug SALVAGE PRINCESS reported at 1949 Exchequer Court Reports at page 230 was faced with the same question as is now before this Court and expressed itself as follows:—

> "The question then arises whether such (limited) liability should be calculated on the tonnage of the tug, or of the barge, or on the combined tonnage of tug and barge."

The Court ruled that the owners of the tug and barge who were seeking to limit their liability under Canadian law, had to bring into account the tonnage of those of their vessels as may have contributed to the damage by actual impact or by their momentum. Liability must be calculated on the aggregate tonnage of the wrong doing mass.

In the case of the ships *A. L. Smith and Chinook* v. *The Ontario Gravel Freighting Company* reported at 51 (1915) Supreme Court Reports at page 39, the Supreme Court of Canada had to consider the liability of the owners of a tug and tow involved in a collision for which they were found responsible and the Court expressed itself as follows:

> "Here we have two vessels necessarily connected for the purpose of the particular business in which both were engaged for the benefit of their common owner and both in the position and under the control of the same crew for all the purposes of their navigation. As a result of the way in which that navigation was carried on, a collision occurred, to which both vessels contributed."

The Court in these circumstances held that the tug and tow must be regarded as one ship and each was liable for the consequences of the collision.

The Exchequer Court of Canada in the case of the M. S. PACIFIC EXPRESS, above quoted, followed the decisions of the English Courts in the following cases:

THE RAN; THE GRAY GARTH (1922)—Probate, page 80.
THE HARLOW (1922)—Probate, page 175.
THE ALDE (1926)—Probate, page 211.

We urge that the decision of the Court of Appeals in the present case be reviewed on the issue of how the calculation of the limited liability of owners of tugs and tows should be made and that the rule adopted by the Canadian and British Courts be followed, not only to ensure uniformity, but also to permit reasonable recovery from negligent owners of tugs and tows in cases of casualties brought about by the wrongful navigation of such tugs and tows belonging to the same owners and operated as single units.

CONCLUSION

For the foregoing reasons it is respectfully submited that the petitions for a Writ of Certiorari should be granted.

Dated: New York, N. Y.,
November 10, 1958.

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JEAN BRISSET, Q. C.
Of Counsel

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PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI

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Office Supreme Court, U.S.
FILED
FEB 5 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM 1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t Rincon Hills, and as bailee of the cargo laden thereon and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

—against—

THE STEAMTUG LONG BRANCH, the Railway Carfloats No. 61 and 56, Central Railroad Company of New Jersey, the steamtugs "Ajax" and "Bjax," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

(and three related causes)

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES S. HAIGHT
ROBERT M. JULIAN
Counsel for Petitioners

Dated: February 5, 1959

Supreme Court of the United States

OCTOBER TERM 1958

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t Rincon Hills, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel, *Petitioners,* *—against—* THE STEAMTUG LONG BRANCH, the Railway Carfloats No. 61 and 56, Central Railroad Company of New Jersey, the steamtugs "Ajax" and "Bjax," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION, *Respondents.* (and three related causes)	No. 511

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that this Court grant a rehearing of its order dated January 12, 1959, which denied the petition herein for a writ of certiorari, filed on November 12, 1958.

Subsequent to the filing of the petition herein, and 10 days prior to the date of the Court's order herein, a petition was filed in this Court for a writ of certiorari, Docket No. 617, entitled *Peter Paul, Inc., et al, Petitioners* v. *Rederi A/B Pulp, et al, Respondents.* Such petition presents a question concerning limitation of liability, and has not yet been acted upon by this Court.

On February 3, 1959, a petition for rehearing was filed in this Court, Docket No. 514, *States Steamship Company, Petitioners* v. *United States of America, et al., Respondents,* in which case this Court denied the petition for a writ of certiorari on the same date that the Court denied the petition herein.

The filing of the petition in the *Peter Paul* case illustrates the wide-spread concern in and the importance of limitation of liability to cargo interests, who filed the petition, as well as to all other shipping interests. We urge that this petition for rehearing merits in itself favorable consideration by this Court; and in any event if this Court should wish to review the basis for the decision in either the *Peter Paul* case or in the *States Steamship Company* case, we believe it should review the decision in this case in order to have before it the broad aspects of the Limitation of Liability Statute and the conflicts which have arisen in the various Circuits. There is undoubtedly a conflict as to the standards applied in the Courts of Appeals for the Second Circuit, the Sixth Circuit and the Ninth Circuit and in an earlier decision of this Court regarding the interpretation of "privity or knowledge" of the shipowner as ground for denying or granting limitation of liability; and there is also conflict between American, British and Canadian law as to the extent of the limitation fund. The present confusion affects a large segment of the American economy, the entire ocean-going and inland water transportation system, and also affects foreign flag vessels in American waters.

The conflicts in decisions between Circuits are as follows:

The *Second* Circuit in the present case, *Deep Sea Tankers, Limited,* allowed limitation of liability, by adding to the statutory standard of "privity or knowledge" the element of "wilful fault."

The *Sixth* Circuit in *Henson* v. *Fidelity & Columbia Trust Co.*, 69 F. 2d 778, 779 (1934) denied limitation of liability, and expressly rejected the argument of the shipowner that he should be allowed to limit his liability unless his conduct involved either bad faith or wilfulness.

The *Ninth* Circuit in the *States Steamship Company* case, denied limitation of liability and did not require wilful fault for such denial.

The *Second* Circuit in the *Peter Paul* case, granted limitation of liability and did not require freedom from wilful fault.

This Court in *Spencer Kellogg Co.* v. *Hicks*, Administratrix, et al, 285 U. S. 502 (1932), denied limitation of liability, and did not require freedom from wilful fault.

There is also a conflict on the international level between decisions of American Courts and decisions of the Courts of Great Britain and Canada as to whether the tonnage or value of the tow is to be included in the limitation fund, Canada and Great Britain requiring inclusion of the tow and the 1919 decision of this Court in the *Liverpool* case, 251 U. S. 48 (1919), excluding the tow. Canada: *A. L. Smith and Chinook*, 51 S. C. R. 39 (Canada 1915); *The Pacific Express* v. *Tug Salvage Princess*, 1949 Exch. C. R. 230 (Canada Law Reports, 1949). Great Britain: *The Ran*, (1922) P. 80; *The Harlow*, (1922) P. 175; *The Alde*, (1926) P. 211.

The requirement of "wilful fault" in order to deny limitation to the shipowner is an unwarranted extension in interpreting the statutory standard of "privity or knowledge," and goes far beyond the standards previously applied.

This highlights the variance in opinions interpreting the meaning of "privity or knowledge." At the present time no one knows with any reasonable degree of certainty

where any particular case will fall on the spectrum of judicial opinion.

Information has become available subsequent to the filing of the petition which we believe should be presented to this Court for its consideration.

The effect of the opening of the St. Lawrence Seaway and the scope of barge traffic on inland waters is vividly reported in the January, 1959, issue of *Marine News*, a monthly magazine of wide circulation. Clarence G. Morse, Esq., Chairman of the Federal Maritime Board and Maritime Administrator, reviewed United States maritime progress, and stated (p. 42) that upon the opening of the St. Lawrence Seaway, the Great Lakes will become "a vital American ocean link." The *Marine News* (p. 43) describes the Great Lakes as our "FOURTH SEA COAST." The size of barges and barge operations is described by Braxton B. Carr, President of American Waterways Operators, Inc., as being in 1957 no less than 392 million tons of cargo transported over 115 billion ton-miles (p. 48). A photograph, reproduced herein as Appendix A, shows the tremendous bulk and unwieldiness of a barge tow as it proceeds in a narrow channel. It would take little persuasion to demonstrate that this tow could block another vessel and we believe this is what the Circuit Court had in mind when it criticized the 1919 decision of this Court in the *Liverpool* case, *supra*.

The same issue of *Marine News* also reports (p. 54) that the world's largest non-propelled oil barge was launched in Beaumont, Texas, for use in New York Harbor. A photograph of the barge and the accompanying text is reproduced herein as Appendix B. The barge, we submit, is nothing short of a tanker whose propelling equipment was eliminated from its hull. The motive power would be supplied by a tug, which makes the entire unit unwieldy. However, under the decision of the Second Circuit, only the tug's value need be surrendered even when the tow's unwieldiness causes damages to other craft being properly navigated.

There should be at least *in rem* liability on the part of a barge which is the size of a ship and which blocks the navigation of another vessel. See also Appendices C and D in which are reproductions of articles, in the same issue of *Marine News* (pp. 52, 51) describing the construction and delivery of other large non-propelled craft.

The privilege of limiting liability is of utmost importance to innocent claimants as well as shipowners, because the size of the fund available for satisfying claims is often only a fraction of the amount of damages. In this case, the amount of the two limitation funds, excluding the tows, is less than $150,000, in partial compensation of damages in excess of $1,000,000.

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari, we respectfully pray that rehearing be granted and that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

CHARLES S. HAIGHT
ROBERT M. JULIAN
Counsel for Petitioners

Dated: February 5, 1959

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of this Court.

CHARLES S. HAIGHT

ROBERT M. JULIAN